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CITATIONS

730874—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 874

MAX LOUIS PESKOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial per curiam opinion of the circuit court of appeals affirming petitioner's conviction (R. 121) is not reported. The opinion of the court on rehearing (R. 127–134) is reported at 157 F. 2d 935.

JURISDICTION

The final judgment of the circuit court of appeals was entered November 14, 1946 (R. 134; see also R. 121–122, 126). On December 3, 1946, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton

to January 13, 1947 (R. 135), and the petition was filed January 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment charges an offense under Section 11 of the Selective Training and Service Act.

2. Whether the evidence is sufficient to support petitioner's conviction of knowingly and falsely informing his draft board that he held a commission in the Inactive Reserve of the Army, whereby he obtained an exemption from training and service under the Act.

3. Whether the prosecution is barred by the statute of limitations.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the appendix, *infra*, pp. 17–21.

STATEMENT

On February 6, 1945, petitioner was indicted in the United States District Court for New Jersey in one count charging a violation of Section 11 of the Selective Training and Service Act (R. 1, 3–4). The indictment alleged that petitioner, as a registrant under the act, had a duty honestly and

truthfully to inform his local board of his true and correct status, and that with intent to induce the local board to place him in a classification to which he was not entitled, petitioner, on February 10, 1942, did

> wilfully knowingly and feloniously and contrary to his said duty, send, transmit, and deliver and cause to be sent, transmitted and delivered to the said Local Board Number 2, a certain letter in the following tenor and effect, to wit:
>
> "FEBRUARY 10, 1942.
>
> "DEAR SIR:
>
> "My status has not been changed.
>
> "Sincerely, /c/ MAX PESKOE"

having previously informed the said Local Board Number 2 by letter under date of May 14, 1941 as to his eligibility and liability for military service in the following manner, to wit:

> "MAY 14, 1941.
>
> "Gentlemen:
>
> "I wish to advise that at the present time I hold a Commission of Second Lieutenant in the In-Active Reserves of the U. S. Army, having secured this Commission after the completion of four year R. O. T. C. at Rutgers University in 1929. I believe this information will eliminate the necessity of filling out the enclosed form. I will be glad to furnish any further information that you may desire.
>
> "Sincerely yours,
>
> /s/ MAX PESKOE."

> which said letter was false and untrue and well known to the said Max Louis Peskoe to be false and untrue in this, that the said Max Louis Peskoe did not hold a commission of Second Lieutenant on May 14, 1941, the said Max Louis Peskoe having been advised by the War Department that his commission of Second Lieutenant had terminated on July 24, 1939; * * *.

Petitioner was convicted after a jury trial, and he was sentenced to imprisonment for one year and one day (see R. 2). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the judgment was first affirmed on July 23, 1946, in a *per curiam* opinion (R. 121–122). Thereafter, a petition for rehearing (R. 122–125) was granted (R. 126), the case was reargued (R. 126), and on November 14, 1946, the court rendered a full opinion again affirming the judgment (R. 126–134).

As petitioner states (Pet. 2), the material facts are not in dispute. Petitioner is a member of the bar of New Jersey, but he has not actively practiced law (R. 65). Instead, he is engaged in the wholesale automotive parts business (R. 57). In 1929 he was graduated from Rutgers University, where he was a member of the Reserve Officers Training Corps, and shortly after his graduation he was commissioned a Second Lieutenant of Infantry in the Officers' Reserve Corps of the Army (R. 58). The commission

was for a term of five years and it was renewed in 1934 (R. 58, 116–117). It appears from petitioner's service record that on July 27, 1939, he was notified by the Adjutant General's Office that his commission had expired and that since he had not qualified for reappointment, it would not be renewed (R. 120, 51–52). He was never at any time appointed a Second Lieutenant in the Inactive-Reserve provided for by paragraph 6 *a* (19) of Army Regulations 140–5, *infra*, pp. 18–21.

After the enactment of the Selective Training and Service Act, petitioner registered with Local Board No. 2, County of Middlesex, New Jersey (see R. 7-8). On May 12, 1941, the local board forwarded to petitioner the selective service questionnaire (R. 8). On May 14, petitioner returned the questionnaire without filling it in and submitted to the local board the letter of that date set out *in haec verba* in the indictment, *supra*, p. 3 (R. 119). On May 16, the board requested petitioner "to substantiate your statement that you are a Second Lieutenant in the inactive reserve of the U. S. Army" (R. 111). In the meantime, on May 17 the local board classified petitioner I-C, the classification for members of the armed forces, including commissioned officers in the Officers' Reserve Corps (R. 8, 112H).[1] On

[1] A member of the local board testified that he interpreted petitioner's letter as meaning "that he is a commissioned officer and that the board has nothing further to do with him" (R. 26). An officer commissioned in the inactive re-

May 21, 1941, in response to the board's letter of the 16th, petitioner appeared at the board's office and exhibited to one of the clerks his commission (R. 39, 116-117), which showed on its face that it had expired in 1939. The clerk noted on the board's letter of May 16 the facts that petitioner had been in the Reserve Officers' Training Corps for four years and that he had been commissioned in 1929 (R. 39, 111). Petitioner was thereafter retained in I-C (R. 112H).

Nothing further occurred until February 6, 1942, when the local board requested petitioner "to advise us of your present status since the declaration of war" (R. 113). Petitioner responded with his letter of February 10, 1942, *supra*, p. 3, stating, "my status has not been changed" (R. 113). On February 25, 1942, the local board wrote petitioner that his selective service questionnaire was "incomplete" and requested that the call at the board's office "to clarify this situation" (R. 113). A clerk of the local board testified that petitioner appeared at the board's office on March 5, 1942, and filled in the questionnaire (R. 41–42, 112A–112H).[2]

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serve provided for by par. 6 *a* (19) of Army Regulations 140–5, *infra*, pp. 18–21, would of course be a member of the Officers' Reserve Corps.

[2] Petitioner disputed this aspect of the Government's evidence. He testified that when he received the letter of May 16, 1941, from the board requesting substantiation of his claim that he was a Second Lieutenant, his questionnaire was returned to him, and that he completed it at that time and

Petitioner remained in I–C from May 17, 1941, until July 11, 1944, when, on the basis of information requested by the local board from the War Department showing that his commission in the Officers' Reserve Corps had expired in 1939, the board reclassified him I–A (R. 32–34, 114–115, 112H). Thereafter, petitioner applied for an occupational deferment (R. 115–116), and on November 1, 1944, he was reclassified II–A, as a person engaged in a business which was essential to the war effort (see R. 34).

ARGUMENT

1. The indictment purports to charge a violation of the third clause of Section 11 of the Selective Training and Service Act, which provides for the punishment of any person

> who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations or directions made pursuant thereto.

Petitioner urges that the indictment fails to

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returned it to the local board (R. 59–60). Petitioner explained the date March 5, 1942, which appears in the jurat at the end of the questionnaire (R. 112G) on the basis that the jurat was not signed at the time he returned the questionnaire in May 1941, and that a local board clerk signed it, without petitioner being present, on March 5, 1942 (R. 60–61).

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charge this offense because, although it alleges that he made a false statement to the local board for the purpose of obtaining an incorrect classification, it does not allege that the false statement was related to his liability or nonliability for military service. Petitioner's argument runs as follows: The second clause of Section 11 (*infra*, p. 17) proscribes the making of a false statement whereby an incorrect classification is obtained and the third clause relates to making a false statement to establish liability or nonliability for service under the Act, i. e., to establish an exemption or exclusion from service as distinguished from a deferment. Since the indictment does not allege that petitioner obtained an incorrect classification, petitioner urges, and the court below agreed with him (R. 129), that it does not charge the offense defined in the second clause. And since the indictment alleges that petitioner made the false statement to "induce and persuade the said board to place the said Max Louis Peskoe in a classification to which he was not lawfully entitled," it is argued that the false statement was alleged to have been directed to obtaining a deferment and not to obtaining an exemption, and thus an offense under the third clause is not alleged. (Pet. 15–16.)

The fundamental difficulty with this argument is that it misapprehends the offenses described in the second and third clauses of Section 11. In

our view, the second clause has no application to this case; it punishes certain conduct by persons who are charged with carrying out duties in the administration of the act, such as local board members, clerks and doctors, and does not extend to registrants under the act. The third clause, on the other hand, as the court below held, punishes any material false statement made by any person, whether or not a registrant, with respect to the fitness or unfitness or liability or nonliability of a registrant for service under the Act.

Both the persons included and the act proscribed in the second clause require this construction. The opening words of the second clause—"any person charged with such duty or having and exercising any authority under the Act"[3]—plainly refer to the person described in the first clause—"any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder"—and to anyone else participating in selective service functions. The quoted words of the first clause aptly describe the persons connected with the Selective Service System who are charged with duties in the adminis-

[3] The opinion of the circuit court of appeals, which quotes part of the second clause (R. 128), does not quote these words, which we think are vital. The court assumed that the second clause could be applied to a false statement by a registrant whereby an incorrect classification is obtained, without discussing this aspect of the question.

tration of the Act. It is the sixth clause which reaches a registrant who fails to perform a duty required of him under the Act. Our position is also supported by the nature of the acts which are described in the second clause; the words of the clause—"false, improper or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster"—describe the various acts of selective service personnel in respect of a registrant.

This construction removes the foundation upon which petitioner's argument rests. But there is another consideration as well. There is no basis for distinguishing, as petitioner seeks to do, between a false statement which is directed to an exemption and one which relates to a deferred classification. A registrant receives a classification whether he is found to be exempt from military service or to be eligible for deferment. Thus, a minister of religion is exempt from service and is classified IV–D (Selective Service Reg. 622.44); a person employed in an essential occupation is deferred and is classified II–A (Selective Service Reg. 622.21). The third clause, we think, is designed to reach any person who makes a material false statement to persons or agencies which participate in the classifying process to induce a registrant's classification in a classification other than that in which he should be placed, regardless of whether it is a deferred or exempt classification.

The indictment clearly charges that petitioner made such a statement and thus, we submit, charges an offense proscribed by Section 11 of the Act.

2. Petitioner does not deny that he was informed by the War Department in 1939 that his commission in the Officers' Reserve Corps had terminated. Nor does he deny that he informed his local board in May 1941 that "at the present time I hold a commission of Second Lieutenant in the inactive reserve of the U. S. Army" (R. 119). He reasserted this same claim in February 1942, when, in response to the local board's inquiry, he informed the board that "My status has not been changed." His only apparent purpose in making these statements was to induce the board to classify him in a classification other than I–A. Otherwise his assertion that his status as a commissioned officer relieved him of the obligation to fill in the selective service questionnaire was meaningless. That petitioner accomplished his objective is evident from the fact that immediately after he falsely informed the board as to his military status he was classified in I–C and he retained that classification through the greater part of the war, from May 17, 1941, to July 11, 1944. The jury was instructed that before they could convict petitioner they must find that he knowingly made the false statement to the board with intent to deceive it as to his liability for service (R. 103–105). We submit

that the evidence amply supports the jury's verdict. Cf. *United States* v. *Virzera*, 149 F. 2d 188 (C. C. A. 2), certiorari denied, 326 U. S. 721.

Petitioner, however, attacks the sufficiency of the evidence in several particulars which we think do not require extended discussion.

a. He argues (Pet. 12–18) that his false statement was not material to his liability for service, because there is no provision in law for exempting or deferring from service one who is in the "inactive" reserves, as he represented himself to be. But the Officers' Reserve Corps had an Inactive Reserve section for those who for a number of reasons were unavailable for active duty; therein were included officers past the retirement age, or who had served 15 years in the Reserve Corps, or who had become physically disabled in line of duty. See paragraph 6 *a* (19), Army Regulations 140–5, *infra*, pp. 18–21. The Inactive Reserve did not, however, include men such as petitioner whose appointments had been terminated; such individuals were no longer members of the Officers' Reserve Corps. It was, therefore, perfectly reasonable for the local board to interpret petitioner's representation as meaning that he still held a commission as a Second Lieutenant in the Officers' Reserve Corps, of which petitioner had been a member for a number of years, but in which he was no longer active. The fact is that the board did so understand peti-

tioner's representation, and it therefore classified him I–C (see R. 26). Notwithstanding the facts that petitioner enjoyed this classification for more than three years and that he knew he was not in any way affiliated with the armed forces, he did nothing to advise the board that it had misinterpreted his representation, as he now claims. In the circumstances, petitioner is hardly in a position to urge that the jury could not reasonably conclude that his false representation was related to his liability for service under the Act.

b. Petitioner's argument (Pet. 19–20) that the local board did not rely on his false representation is patently without merit. The facts show that immediately upon receipt of his letter of May 14, 1941, the board classified him I–C, even before he appeared at the board to substantiate his claim (R. 8–9, 39, 112). After the outbreak of the war, the board inquired into petitioner's status again, and on the basis of his representation that his status remained unchanged, his I–C classification was not disturbed. A member of the local board testified that petitioner was originally classified as a member of the armed forces on the basis of his May 14 letter and the certificate he later exhibited to the board clerk, which showed that he had held a commission in the Officers' Reserve Corps (R. 9). Petitioner's I–C classification was changed in 1944 only after the

falsity of his representation was conclusively established by information received by the board from the War Department. Quite plainly, but for petitioner's false representation, he would never have been classified I–C.

c. Petitioner also argues (Pet. 21–24) that there is no evidence of any criminal intent on his part, because he probably would have been deferred from service in any event because he has defective eyesight, he was engaged in an essential activity, and his wife is dependent upon him for support. But the short answer to this argument is that in May 1941, he did not know whether he would be deferred on any of those grounds. And, assuming that he would have been, a deferment is not permanent; the local board could have withdrawn it as conditions changed. On the other hand, the I–C classification which he obtained meant that he would not be drafted so long as the board believed he held a commission. Qualitatively, the I–C classification was preferable to a possible deferment. At least, in judging petitioner's intent, the jury under proper instructions (see R. 104–105) was entitled to find that he sought exemption as a commissioned officer from service under the Act, and its verdict demonstrates that the jury did so find.

d. Petitioner's contention (Pet. 24–26) that his letter of February 10, 1942, stating that his status

remained unchanged, was truthful and therefore furnishes no basis for prosecution, overlooks the realities of the situation. Petitioner had obtained what to him was an advantage under the Act by virtue of the false representation made to the local board in May 1941. In February 1942, after the war had commenced, the board again inquired into petitioner's liability for service under the Act, and petitioner informed the board merely that "My status has not been changed" (R. 113). In the light of what had gone before, the February letter plainly meant that petitioner still held a commission. It is true, as petitioner argues, that there had been no change in his status, but the letter perpetuated the deceit which had been practiced on the board, and it is for this that petitioner was prosecuted.

3. Petitioner urges (Pet. 26–27) that if an offense was committed, it occurred in May 1941, when he first informed the local board that he held a commission and that since the indictment was returned on February 6, 1945, prosecution is barred by the three-year statute of limitations (18 U. S. C. 582). The difficulty with this argument is that petitioner was not prosecuted for the May 1941 letter. The indictment charged, and the jury found, that he made a false representation concerning his liability for service under the Act when he sent the February 10, 1942, letter to the local board. It is true that the meaning of the

letter must be ascertained from events which occurred more than three years prior to institution of the prosecution, but the statute of limitations does not foreclose the use in a timely prosecution of evidence of events which occurred more than three years before the prosecution was instituted.

If petitioner had told his local board in February 1942 that his prior representation was false and that he did not hold an officer's commission, there can be no doubt that the board would have changed his I–C classification. As we have said, petitioner's February 1942 letter perpetuated the fraud which he first practiced in 1941, and it is thus as much a false representation as to his liability for service as was his original letter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
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Attorneys.

FEBRUARY 1947.

APPENDIX

The Selective Training and Service Act of 1940 (50 U. S. C. App., Supp. V, 301 *et seq.*) provides in pertinent part:

> SEC. 5. (a) Commissioned officers * * * of the * * * Officers' Reserve Corps * * * shall not be required to be registered under section 2 and shall be relieved from liability for training and service under section 3 (b).
>
> SEC. 11. [1] Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, [2] and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, [3] and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, [4] or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, [5] or who knowingly counsels, aids, or abets

another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, [6] or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, [7] or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, [8] or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

Army Regulations 140–5, June 16, 1936, effective July 1, 1936, provided in part as follows:

6. Authorized sections.—*a.* Members of the Officers' Reserve Corps are commissioned in sections thereof which correspond with the arms and services of the Regular Army. In addition to these, several other sections have been established in the Offi-

cers' Reserve Corps by the President's direction in which officers procured for special purposes are commissioned. The authorized sections of the Officers' Reserve Corps are listed below:

* * * * *

(19) *Inactive Reserve, Inact-Res.*

(*a*) In this section will be placed—

1. All Reserve officers who have reached the age of 64 years.

2. All Reserve officers who, upon completing 20 years' service in the Army, may apply for transfer to this section. In computing this 20 years' service, prior service in the federally recognized National Guard may be counted.

3. All Reserve officers relieved of assignment under provisions of paragraph 49, who have 15 years' satisfactory commissioned service at the time of their relief, may make application for transfer to this section.

4. All Reserve officers who, having become physically disqualified, other than through their own misconduct, to perform the duties incident to the grades held by them, may apply for transfer to this section. Such requests will be accompanied by W. D., A. G. O. Form No. 63 (Report of Physical Examination).

(*b*) Officers while commissioned in this section will not be eligible for promotion, assignment, or active duty in time of peace. No original appointments will be made in this section. The Chief of the Personnel Bureau, The Adjutant General's Office, will exercise supervision over this section.

(*c*) *1.* No officer will be promoted upon transfer to this section except as specified hereafter.

2. An officer of a grade not exceeding that of lieutenant colonel who has served the required time in grade and who meets all other requirements for promotion except satisfactory physical examination may be transferred to this section in the next higher grade, if placed in this section under (*a*) *1, 2,* or *4* above.

3. An officer reaching the age of 64 years without having attained the highest grade held by him during the World War will be transferred to this section in such World War grade.

Army Regulations 140–5, June 17, 1941, effective July 1, 1941, provided in part as follows:

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(*b*) Officers while commissioned in this section will not be eligible for promotion, assignment, or active duty in peacetime. No original appointments will be made in this section. The Chief of the Personnel Bureau, The Adjutant General's Office, will exercise supervision over this section.

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2. An officer of a grade not exceeding that of lieutenant colonel who has served the required time in grade and who meets all other requirements for promotion except satisfactory physical examination may be transferred to this section in the next higher grade, if placed in this section under (*a*), *1, 2,* or *4* above.

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U. S. GOVERNMENT PRINTING OFFICE: 1947